COURT OF APPEALS
DECISION
DATED AND FILED

February 25, 2016

Diane M. Fremgen
Clerk of Court of Appeals

Appeal No. 2015AP1188-CR **Cir. Ct. No. 2013CF72**

STATE OF WISCONSIN **IN COURT OF APPEALS**
DISTRICT IV

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

SALVATORE L. SLIES,

DEFENDANT-APPELLANT.

APPEAL from a judgment of the circuit court for Waushara County: BERNARD BEN BULT, Judge. *Affirmed*.

Before Kloppenburg, P.J., Lundsten and Sherman, JJ.

¶1 PER CURIAM. Salvatore Slies appeals a judgment of conviction for felony bail jumping entered after a jury trial. The bail jumping charge was based on contact Slies had with a person he was prohibited from contacting. He argues that he is entitled to a new trial because the circuit court erroneously

admitted as other acts evidence written communications Slies had previously sent to the same person and because in closing arguments the State improperly used the other acts evidence as propensity evidence.[1] We affirm the judgment.

BACKGROUND

¶2 This appeal concerns charges based on conduct in 2013. On March 11, 2013, three packages containing personal items and written messages signed with Slies' name arrived at the home and offices of C.M., Slies' former dentist. The State alleged that Slies sent the three packages. Because Slies had previously sent numerous harassing communications to C.M., Slies was at that time subject to a harassment injunction prohibiting contact with C.M. Violating an injunction is a crime. *See* WIS. STAT. § 813.125(7) (2011-12).[2] Slies was also free on bond in a felony case. The State charged Slies with felony bail jumping contrary to WIS. STAT. § 946.49(1)(b) based on the allegation that he violated the no-crimes condition of his bond by sending the packages. Slies denied sending the packages; the defense theory was that a brother with whom he was feuding had sent them to cause trouble for Slies.

[1] Slies also argues that the circuit court erred by failing to delay its ruling on the other acts evidence motion and by failing to give the jury a limiting instruction concerning the other acts evidence. Because the record does not reflect that Slies asked for a delayed ruling on the other acts evidence or that he requested such a limiting instruction, Slies has forfeited these issues. *See* ***State v. Ndina***, 2009 WI 21, ¶¶29-30, 315 Wis. 2d 653, 761 N.W.2d 612; ***State v. Payano***, 2009 WI 86, ¶100, 320 Wis. 2d 348, 768 N.W.2d 832 (limiting instructions not required unless requested).

[2] All further references to the Wisconsin Statutes are to the 2013-14 version unless otherwise noted.

¶3 The State sought to admit an e-mail and seven faxes that Slies had sent to C.M. in 2010[3] as other acts evidence for multiple purposes, including showing motive and identity. The circuit court ruled the evidence admissible under the test set forth in ***State v. Sullivan***, 216 Wis. 2d 768, 772-73, 576 N.W.2d 30 (1998). In closing arguments, the prosecutor argued that the e-mail and faxes from 2010 showed motive, intent, and identity for the 2013 crime. The prosecutor also told the jury: "If you [look at the other acts evidence] together with all of the other evidence, you will find time and time and time again there is a whole host of indicators, all one after the other pointing to Salvatore Slies as the drafter and sender of those documents." The jury convicted Slies.

DISCUSSION

Other Acts Evidence

¶4 "[E]vidence of other … acts is not admissible to prove the character of a person in order to show that the person acted in conformity therewith," but such evidence is not excluded "when offered for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident." WIS. STAT. § 904.04(2). The inquiry into a circuit court's exercise of "'discretion in making an evidentiary ruling is highly deferential.'" ***State v. Shomberg***, 2006 WI 9, ¶11, 288 Wis. 2d 1, 709 N.W.2d 370 (quoted source omitted). The question on appeal is whether the circuit court exercised its discretion in accordance with accepted legal standards and in accordance with the

[3] The State also sought to introduce evidence of Slies' sending C.M. a package via certified mail in 2008 containing the removable partial dentures that C.M. had made for Slies. Slies told the circuit court that he wanted the 2008 package evidence to come in, and he did not object to it.

facts of record. ***Id.*** We will not find an erroneous exercise of discretion if there is a rational basis for a circuit court's decision. ***Id.*** A circuit court's failure to delineate the factors that influenced its decision constitutes an erroneous exercise of discretion. ***Sullivan***, 216 Wis. 2d at 781.

¶5 The applicable legal standard is that, to be admissible, evidence of other acts by a defendant must be relevant, must be offered for an acceptable purpose such as establishing motive, and must have a probative value that is not substantially outweighed by the danger of unfair prejudice. ***Id.*** at 772-73. To be relevant, it must "relate[] to a fact or proposition that is of consequence to the determination of the action" and have "a tendency to make the consequential fact or proposition more probable or less probable than it would be without the evidence." ***Id.*** at 772.

¶6 The circuit court cited the ***Sullivan*** test, and addressed each prong. The court first referenced the permissible purposes of intent, plan, knowledge, identity, and motive, and found it "inescapable" that the evidence was offered for a permissible purpose. The court then considered the relevance question, and concluded that "the type of communication, the type of interrelationship with [C.M.]" was "at the heart of the particular matter" being tried. The court noted that the test for unfair prejudice was "the type of evidence that would arouse horror, that would arouse the instinct to punish," and found that the danger of unfair prejudice did not outweigh the evidence's probative value. The court took steps to limit the danger of unfair prejudice by excluding a two-page document the State submitted that summarized the dates and types of contacts Slies had had with C.M. 70 times over a two-and-a-half-year period.

¶7 The circuit court recognized ***Sullivan*** as the applicable legal standard and exercised its discretion in accordance with the legal standard and the facts. The court noted that the evidence showed the type of communication Slies had engaged in in the past which, in turn, showed motive and was relevant to the question of whether Slies was the sender of the three similar letters in 2013. We agree. The e-mail and faxes from 2010 showed the basis of Slies' deeply held grievances against C.M., the methods Slies had used to communicate them, and the nature of his messages. It was relevant that, as testimony showed, those communications occurred after law enforcement had told Slies to stop communicating with C.M. and an injunction was in place. The fact that the circuit court excluded a summary of 70 earlier contacts shows that the court carefully considered the proper factors.

¶8 In sum, the circuit court's decision is easily affirmed based on the fact that the challenged evidence was highly relevant to motive and identity.

Closing Arguments

¶9 As to Slies' argument that the State improperly used the other acts evidence during closing argument, Slies failed to object at trial. Where no objection is made to closing argument, claims of error are forfeited. *See* ***Davis v. State***, 61 Wis. 2d 284, 287, 212 N.W.2d 139 (1973). Review of such arguments is limited to the question of whether the defendant is entitled to a new trial because the prosecutor's conduct constituted "plain error" under WIS. STAT. § 901.03(4) and to accomplish the ends of justice under WIS. STAT. § 752.35. *See* ***State v. Davidson***, 2000 WI 91, ¶¶87-88, 236 Wis. 2d 537, 613 N.W.2d 606. When a defendant alleges that a prosecutor's statements constituted misconduct, the test we apply is whether the statements "so infected the trial with unfairness as to

make the resulting conviction a denial of due process." ***Id.***, ¶88 (internal quotation marks and citation omitted).

¶10 Slies says that, in closing argument, the prosecutor argued the forbidden inference (that Slies should be found guilty of sending the three documents in 2013 because he had sent documents in 2010). Slies argues that the prosecutor did this by drawing the jury's attention to the 2010 documents and saying that "time and time and time again there is a whole host of indicators" that pointed to Slies' guilt for the 2013 offense. We reject the argument.

¶11 The prosecutor's argument was proper. The comments to which Slies objects are properly understood as an argument that the 2010 messages from Slies supported the inference that Slies used that method to contact and harass the victim and was highly motivated to do so. Indeed, the prosecutor went on to explain the permitted purposes of the evidence during the remainder of his argument.

By the Court.—Judgment affirmed.

This opinion will not be published. *See* WIS. STAT. RULE 809.23(1)(b)5.